

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER DIVISION**

**ELLEN GILINSKY, Ph.D.
DIRECTOR**

P.O. Box 1105

Richmond, VA 23218

Subject: Guidance Memorandum No. 10-2002
Virginia Water Protection Permit Program Noncompliance Determination and
Enforcement Referral Guidance

To: Regional Directors

From: Ellen Gilinsky, Ph.D., Director



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Copies: Deputy Regional Directors, Regional VWPP Program Managers, Regional Water
Permit Managers, James Golden, Rick Weeks, Central Office VWPP Program Staff

Summary:

This guidance document provides direction for evaluating noncompliance with Virginia Water Protection Permit (VWPP) Program regulations and provides a point system for determining the appropriate compliance response, including when to refer cases to the Division of Enforcement. The point system allows VWPP Program staff (Staff) to consistently assess and respond to alleged noncompliance. This guidance replaces the VWPP portion of the DEQ Guidance Memorandum No. 02-2010 – Water Compliance Auditing Manual (dated May 23, 2002, amended March 25, 2008) and the 1999 Enforcement Manual, which refers to DEQ Guidance Memorandum No. 02-2010 for the VWPP Program.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for Staff internally on DEQNET, and for the public on the Department of Environmental Quality's (DEQ) website at: <http://www.deq.virginia.gov>.

Contact information:

Please contact David Davis, Office of Wetlands and Water Protection, (804) 698-4105 or dldavis@deq.virginia.gov if there are any questions about this guidance.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

I. PURPOSE

This guidance establishes procedures for addressing alleged permit noncompliance and unpermitted activities for the Virginia Water Protection Permit (VWPP) Program. It establishes methods and tools for quantifying noncompliance and unpermitted activities in order to determine the appropriate compliance response and for referring cases to the Division of Enforcement. The guidance revises the Point Assessment Criteria and makes it the required procedure for assessing noncompliance in the VWPP Program.

II. BACKGROUND AND AUTHORITY

The Water Compliance Auditing Manual 02-2010 (dated May 23, 2002, amended March 25, 2008) includes procedures for addressing alleged noncompliance for DEQ Water Division programs, including the VWPP Program. The manual provides the Water Division with procedures to promote Regional Office consistency when processing compliance information. Since statutory changes in 2000 expanded the VWPP Program, the guidelines presented in Guidance Memorandum No. 02-2010 – Water Compliance Auditing Manual (dated May 23, 2002, amended March 25, 2008), do not reflect current program needs. This guidance replaces Guidance Memorandum No. 02-2010 – Water Compliance Auditing Manual procedures for the VWPP Program. In addition, Staff should refer to this guidance when other DEQ documents, such as enforcement guidance or manuals, reference Guidance Memorandum No. 02-2010 – Water Compliance Auditing Manual, when addressing VWPP Program compliance.

The DEQ’s authority to conduct compliance investigations and inspections is provided for in the State Water Control Law ([Va. Code 62.1-44.2 thru 62.1-44.34:28](#)), VWPP Program Regulation ([9 VAC 25-210-10 et seq.](#)), and permit conditions.

- Code of Virginia ([§ 62.1-44.15\(6\)](#)) states: “To make investigations and inspections, to ensure compliance with any certificates, standards, policies, rules, regulations, rulings and special orders which it may adopt, issue or establish and to furnish advice, recommendations, or instructions for the purpose of obtaining such compliance.”
- Code of Virginia ([§ 62.1-44.20](#)) states: “Any duly authorized agent of the Board may, at reasonable times and under reasonable circumstances, enter any establishment or upon any property, public or private, for the purpose of obtaining information or conducting surveys or investigations necessary in the enforcement of the provisions of this chapter.”
- [9VAC 25-210-90.D](#) Inspection and Entry of the VWPP Program Regulation states: “Upon presentation of credentials, the permittee shall allow the board or any duly authorized agent of the board, at reasonable times and under reasonable circumstances, to conduct the actions listed in this section. For the purpose of this section, the time for inspection shall be deemed reasonable during regular business hours. Nothing contained herein shall make an inspection time unreasonable during an emergency.

1. Enter upon any permittee's property, public or private, and have access to, inspect and copy any records that must be kept as part of the VWP permit conditions;

2. Inspect any facilities, operations or practices (including monitoring and control equipment) regulated or required under the VWP permit; and
 3. Sample or monitor any substance, parameter or activity for the purpose of ensuring compliance with the conditions of the VWP permit or as otherwise authorized by law.”
- The Code of Virginia ([§ 10.1-1186](#)) authorizing enforcement activities, states: “Notwithstanding any other provision of law and to the extent consistent with federal requirements, following a proceeding as provided in [§ 2.2-4019](#), issue special orders to any person to comply with: (i) the provisions of any law administered by the Boards, the Director or the Department, (ii) any condition of a permit or a certification, (iii) any regulations of the Boards, or (iv) any case decision, as defined in [§ 2.2-4001](#), of the Boards or Director.”
 - The VWPP Program Regulation ([9 VAC 25-210-240](#)) identifies DEQ enforcement staff as the lead for unpermitted surface water impacts: “The board may enforce the provisions of this chapter utilizing all applicable procedures under the law and [§ 10.1-1186](#) of the Code of Virginia.”

III. DEFINITIONS

The definitions in [9 VAC 25-210-10](#) of the VWPP Program Regulation and VA Code [§ 2.2-4001](#) apply to this guidance. The following definitions are especially pertinent to this guidance:

Administrative Requirements: Requirements within permit conditions that involve providing notifications, reports, submittals, or other documents to DEQ, primarily for self-reporting compliance activities.

Alleged Noncompliance: Suspected failure to abide by requirements of permit conditions, regulations, or laws.

Enforcement Action: Means any action taken by the Division of Enforcement, including but not limited to a Consent Special Order, a Special Order issued after a formal or informal hearing, a Letter of Agreement, or a referral to the Office of the Attorney General. The term Enforcement Action does not include dereferral of a case.

Onsite Requirements: Permit conditions that involve requirements related to onsite construction or other activities in and around State waters. Onsite requirements are permit conditions not related to administrative requirements or other notifications, reports, or other documents required by DEQ. For example, these requirements would include culverts installed to maintain low flow conditions, stabilization of exposed slopes and streambanks immediately upon completion of work in each permitted impact area, flagging or demarcation of nonimpacted surface waters within 50 feet of permitted activities, adherence to time-of-year restrictions, etc.

Major Exceedance: Permitted project where unauthorized activity typically exceeds the minor modification/notice of planned change thresholds (For specific thresholds, *see* [9 VAC 25-210-180](#), [9 VAC 25-660-80](#), [9 VAC 25-670-80](#), [9 VAC 25-680-80](#), [VAC 25-690-80](#)). For surface

water withdrawals only (e.g. does not include fill and/or excavation in surface waters), a major exceedance is typically considered a major surface water withdrawal, which is an unauthorized withdrawal of 90 million gallons per month or greater that does not otherwise qualify for a permit exclusion (*see* [9 VAC 25-210-10](#) and [9 VAC 25-210-60.B](#)). Major exceedance can be more or less than the thresholds, depending on additional factors, such as harm to human health or the environment, the effects on the regulatory program, the size of the exceedance relative to the amount of permitted impacts, or the willingness of the permittee to provide compensation or perform restoration.

Major Unpermitted Impacts: Applies to projects where no permit was obtained in advance of unpermitted impacts requiring compensatory mitigation, (e.g. typically unpermitted impacts exceeding 0.10 acre of wetland or open water, or 300 linear feet of streambed impact). For surface water withdrawals, a major unpermitted impact applies to a withdrawal that is greater than or equal to 90 million gallons per month. Major unpermitted impacts could be more or less than the thresholds indicated depending on additional factors, such as harm to human health or the environment and the effects on the regulatory program.

Minor Exceedance: Permitted project where unauthorized activity is typically less than or equal to minor modification/notice of planned change thresholds (For specific thresholds, *see* [9 VAC 25-210-180](#), [9 VAC 25-660-80](#), [9 VAC 25-670-80](#), [9 VAC 25-680-80](#), [VAC 25-690-80](#)). For surface water withdrawals only (e.g. does not include fill and/or excavation in surface waters), a minor exceedance is typically considered a minor surface water withdrawal, which is an unauthorized withdrawal of less than 90 million gallons per month that does not otherwise qualify for a permit exclusion (*see* [9 VAC 25-210-10](#) and [9 VAC 25-210-60.B](#)). Minor exceedance can be more or less than the thresholds, depending on additional factors, such as harm to human health or the environment, the effects on the regulatory program, the size of the exceedance relative to the amount of permitted impacts, or the willingness of the permittee to provide compensation or perform restoration.

Minor Unpermitted Impacts: Applies to projects where no permit was obtained in advance of unpermitted impacts that do not require compensatory mitigation, when permitted, (e.g. typically unpermitted impacts less than 0.10 acre of wetland or open water, or 300 linear feet of streambed impact and no special resources, such as threatened and endangered species, exist within the project area). For surface water withdrawals, a minor unpermitted impact applies to a withdrawal that is less than 90 million gallons per month. Minor unpermitted impacts could be more or less than the thresholds indicated depending on additional factors, such as harm to human health or the environment and the effects on the regulatory program.

Points: Values assigned to alleged violations based on potential for harm to the environment and/or to the regulatory program. The VWPP Program determines the appropriate method to address alleged noncompliance based on the number of points accumulated.

Unpermitted Activity: Activities occurring without a required permit, such as filling, excavating, dredging, mechanized land clearing, ditching, or activities otherwise affecting the physical, chemical, or biological properties of wetlands, streams, or other State waters.

IV. REVIEWING COMPLIANCE

The primary goal of the VWPP compliance program is timely, appropriate, and consistent application of the VWPP Program Regulation ([9 VAC 25-210-10 et seq.](#)). Staff must work with the regulated community to achieve and maintain compliance with state laws and regulations. Priorities include violation prevention, timely resolution of serious violations, and early identification, correction, and resolution of minor violations. While compliance is the primary goal, Staff must refer activities for enforcement review as appropriate based on severity, history, or other relevant factors. In accordance with Division of Enforcement Guidance Memorandum No. 1-2005 (Revision 1) – Notices of Alleged Violation (NOAVs): Formats and Processes for Warning Letters and Notices of Violation (dated September 25, 2008), Staff addresses noncompliance using informal corrective action, a warning letter (WL), or a notice of violation (NOV). The following guidance addresses methods and procedures to determine the most appropriate approach based on the level of noncompliance.

Comprehensive Compliance Review

Staff should assess compliance continually over the term of a permitted project through frequent follow-up, site inspection, and document review. Using this approach, Staff can discern noncompliance relatively early and responsible parties can bring projects back into compliance before the potential for environmental harm increases. Staff may also review some permits less frequently or in a one-time comprehensive compliance review of the permit file and permitted activity. Permits reviewed less frequently are those that pose the least risk of noncompliance and environmental harm. A comprehensive compliance review includes the following: 1) conducting site inspections and documenting any onsite alleged noncompliance; 2) confirming receipt of all required submittals and approving their content; and 3) reviewing project compliance history.

V. ASSESSING POINTS FOR PERMIT NONCOMPLIANCE AND UNPERMITTED ACTIVITIES

Alleged permit noncompliance or unpermitted activities are evaluated using the Point Assessment Criteria (Appendix A), and associated guidance. The Point Assessment Criteria provides a mechanism for determining the level of response to noncompliance: informal corrective action, WL, or a referral to the Division of Enforcement using a NOV. The Point Assessment Criteria is structured such that more serious instances of noncompliance receive more points. The Points assessed are dependant upon factors such as the severity of environmental harm, the effect on the VWPP Program, and the compliance history.

Staff must use the following procedure when assessing alleged permit noncompliance and unpermitted activities:

1. Staff first identifies alleged permit noncompliance or unpermitted activity through site inspections, file review, and/or other appropriate means. Staff must document alleged permit noncompliance or unpermitted activity using field notes, photographs, inspection forms, file review notes, inspection reports, and/or other methods to provide supporting information for future compliance or enforcement actions. This information constitutes part of the case file

and is used to support any resulting compliance or enforcement actions.

2. Staff then uses the Point Assessment Criteria to characterize all noncompliance identified during a comprehensive compliance review and/or inspection and to group violations into standardized categories (infractions). Once categorized, each individual violation of enforceable documents, State laws, regulations, and permit conditions receives Points or fractions of Points, separately. Staff can also assign additional Points for aggravating factors, in consultation with the Division of Enforcement, if the situation merits (*see* Table 4 of Appendix A for aggravating factors).
3. Staff compiles a comprehensive list of all infractions and resulting Points in order to provide a useful reference for future enforcement cases. Points accrue over the entire permit term. When available, Staff uses the Comprehensive Environmental Data System (CEDS) to track alleged noncompliance and Points.
4. After compiling a comprehensive list of Points, Staff calculates:
 - i) Total onsite Points;
 - ii) Total administrative Points less than or equal to 12 months old (*see* Part VI.B); and
 - iii) Total aggravating factor Points.

Appendix B provides a worksheet to clarify the calculation method. For the purpose of the Point Assessment Criteria, the age of an administrative noncompliance Point is determined using the date the noncompliance occurred, not the date which Staff discovered the noncompliance.

5. Staff uses the sum of all Points calculated to determine the appropriate compliance response.
 - Projects accumulating 1.0 Point or less are addressed through informal corrective action;
 - Projects accumulating 1.1 Point or greater, but no more than 3.9 Points, receive a WL;
 - Projects accumulating 4.0 Points or more receive a NOV and are referred to the Division of Enforcement.

After utilizing Steps 1 through 5 above to calculate the total Points and to determine the appropriate compliance response, Staff review the result of the Point Assessment Criteria with their managers. Situations may arise when a case exceeds the 4.0 Point threshold, but the facts of the case do not merit immediate referral to the Division of Enforcement. However, Staff should always refer unpermitted activities that exceed the 4.0 Point threshold to the Division of Enforcement. Staff can refrain from referring cases to the Division of Enforcement under the following conditions:

- The responsible party has a permit (the activity is not unpermitted);
- No environmental harm resulted from the noncompliance (i.e. no impacts or fill to State waters);

- The responsible party is cooperative and can easily correct the noncompliance. For instance, a delinquent monitoring report is promptly submitted which has the effect of reducing the Point Assessment Criteria calculation below the 4.0 Point threshold;
- The responsible party has corrected previous infractions to the VWPP Program's satisfaction and removing the associated Points reduces the Point Assessment Criteria calculation below the 4.0 Point threshold. Generally, noncompliance corrected more than 6 months ago are not included in Point Assessment Criteria calculations. However, permittees showing a pattern of frequent noncompliance, even when they have corrected previous violations, should still be considered for referral to the Division of Enforcement.

If Staff does not refer a case to the Division of Enforcement in situations where projects accumulate 4.0 or more Points, Staff must document the reasons for overriding the Point Assessment Criteria mechanism. Staff should also refer to the Division of Enforcement Guidance Memorandum No. 1-2005 (Revision 1) when deciding how to address noncompliance.

Staff should only issue additional NOVs for specific violations if the responsible party has failed to respond adequately to earlier NOVs. Staff should only send multiple NOVs after consulting with the Division of Enforcement.

After the responsible party signs an enforcement action, the Points associated with that action are not combined with any new infractions. Once a regulated party has signed an enforcement action, Staff should no longer issue new NOVs for violations addressed by that enforcement action.

Multiple Occurrences

A single compliance inspection or review may identify multiple incidents of the same type of infraction. These multiple incidents would generally not receive Points separately. For example, if Staff finds multiple locations of unpermitted fill during one inspection at a site, Staff sums the impacts to assign Points. Inspection reports should still indicate if more than one location is impacted and over how many days the discharge has occurred. This information is important for determining the severity of the infraction and for enforcement purposes.

Where multiple Point values are shown in the Point Assessment Criteria table (*e.g.*, 0.5, 1.0, 2.0), the first value (0.5) is assigned to the first occurrence. Where alleged noncompliance is ongoing and the responsible party is not addressing the concerns, then the activity receives the next Point amount. Staff assigns the second and subsequent Point values for infractions where the responsible parties have not responded to correct the problem in the allotted timeframe. For infractions that involve ongoing impacts such as dredging, filling, or excavation, each day is considered a separate incident if the alleged violation continues to occur after Staff has notified the responsible party. Other infractions that do not pose an imminent threat to surface water resources or are not expanding may be allowed additional time to correct noted problems. For example, if the permittee has 30 days to comply with the permit conditions and is delinquent, the infraction would be elevated to the next Point level.

VI. ASSESSING NONCOMPLIANCE AND DETERMINING APPROPRIATE COMPLIANCE ACTIONS

A. Exceeding Permitted Impacts or Unpermitted Impacts

Using the Point Assessment Criteria, unpermitted activities are assessed Points for failure to obtain coverage under a VWPP Program general or individual permit. Similarly, Staff also assesses Points for impacts to State waters beyond permit limitations (i.e. permit exceedances). Unpermitted impacts or permit exceedances are categorized according to the size of the impact (*see* Appendix A, Table 1). Major unpermitted impacts are assigned 4.0 Points and receive a NOV, automatically referring the case to the Division of Enforcement. Major exceedances are assigned between 1.0 and 4.0 Points, dependant upon the individual circumstances of the case. This provides Staff some flexibility in assigning Points on a case-by-case basis. Minor unpermitted impacts are assigned 2.0 Points and receive a WL. Minor exceedances are assigned between 1.0 and 2.0 Points, dependant upon the individual circumstances of the case. Again, this provides Staff some flexibility in assigning Points on a case-by-case basis. Points are assigned for the cumulative amount of unauthorized impacts, not the number of occurrences on a site associated with a specific activity. For example, if Staff discovers that a permittee has taken 50 linear feet of total impacts at two locations on the project site while constructing roadways, the project receives 1.0 to 2.0 Points total for a minor exceedance. The permittee would not receive 2.0 to 4.0 Points (i.e. not 1.0 to 2.0 Points for each exceedance).

Aggravating Factors

Classification of an unpermitted impact or permit exceedance as major or minor is based on the size of the impact (*see* Appendix A). However, Staff can also assign additional Points based on other factors associated with unpermitted impacts or permit exceedance. Factors include, but are not limited to the following:

- The acreage or linear feet of fill material (where it exceeds permit reporting or modification thresholds);
- Presence of threatened, endangered, or rare species and habitats;
- Compliance history;
- Impacting wetlands avoided through permit negotiations;
- Wetland or stream type and/or quality;
- Landscape or regional considerations (amount of impact in comparison to size of watershed);
- Whether the landowner was notified that a permit was required;
- Substantial economic benefit;
- If the construction plans indicate additional impacts are still required to complete the project.

In cases where unpermitted impacts or exceedances have occurred, and the responsible party has self-reported, is cooperative, and/or consents to restore the impact after notification, Staff can, on a case-by-case basis, work within the VWPP Program to determine the appropriate compliance response. For example, general permit conditions allow for additional temporary impacts without a notice of planned change, provided that DEQ is notified in writing, the additional temporary impacts are restored to preexisting conditions, and impacts do not exceed the general permit threshold for use (i.e. impacts qualify as a minor exceedance). In cases such as these, informal corrective action would be the appropriate response, as long as the general permit conditions are adhered to in regards to reporting and restoring the temporary impacts. Staff should work closely with the responsible party to restore the area to preexisting conditions.

However, if corrective actions requested by the VWPP Program do not occur within an agreed-upon timeline or are unsatisfactory, Staff should consider issuing a WL or referring the case to the Division of Enforcement with a NOV. In accordance with the Division of Enforcement Guidance Memorandum No. 1-2005 Notices of Alleged Violation (NOAVs) (Revision 1), informal correction is appropriate for deficiencies or violations that can be corrected within 30 days and WLs are appropriate for deficiencies or violations that can be corrected within 90 days. If restoration or correction will take longer, then a referral to the Division of Enforcement may be necessary. Regardless of the compliance response type, any required restoration must adhere to established techniques for restoring streams or wetlands in accordance with an approved Corrective Action Plan that includes a monitoring component to assure success. Please note that since monitoring is typically initiated after restoration actions have been completed, the length of the monitoring period should not be included when calculating the amount of time necessary to complete restoration actions. Therefore, although monitoring periods are typically longer than 90 days in duration, this does not mean that a NOV is automatically warranted.

Occasionally, the Division of Enforcement will de-refer cases sent to them when the merits of the case do not justify continued involvement. Enforcement staff should develop and place a case closure memorandum in the VWPP Program and Division of Enforcement files, providing a reasoned analysis for the de-referral. Depending on the nature of the incident, Staff may continue working with the responsible party to correct environmental damages without Division of Enforcement involvement. If Staff cannot obtain a satisfactory resolution, then Staff should consult with the Division of Enforcement before issuing a new NOV for cases that have been previously de-referred. For some cases, Staff should not continue to pursue compliance once the case is closed. If the VWPP Program is considering permitting the activity, then Staff must follow program guidance regarding resolving unpermitted impacts to surface waters in accordance with DEQ Division of Enforcement and Water Division Joint Guidance Memorandum No. 09-2009 Resolving Unpermitted Impacts to Surface Waters with Enforcement Actions (dated July 28, 2009).

B. Administrative Noncompliance

Timely discovery of administrative noncompliance, such as delinquent reports or notifications, is necessary to refer these infractions to the Division of Enforcement. The total Points calculated in a comprehensive compliance review includes only administrative noncompliance that occurred within the previous 12 months (i.e. the date of noncompliance is no more than 12 months prior to the date noncompliance was discovered). For the purpose of the Point Assessment Criteria calculations, the age of an administrative noncompliance Point is determined using the date of the noncompliance, not the date which Staff discovered the noncompliance. Although not part of the Point Assessment Criteria calculation, Staff must still note any delinquent requirements discovered during the comprehensive compliance review that are greater than 12 months old. These older infractions may support a future enforcement case.

Resolving administrative noncompliance depends on the benefit of receiving the required documents. If receiving late reports or notifications does not provide any benefit, the permittee should be notified regarding the noncompliance and informed that, although the delinquent document is no longer required, enforcement action may be taken.

Staff should not request delinquent documents if:

- The document is past due and receiving the information would not provide any valuable compliance information;
- The permittee has no intention of submitting the document and the case will be referred to the Division of Enforcement; and/or
- The project is complete and the responsible party cannot create the documents or the documents would not provide useful information.

Staff should still require some late submittals to show compliance with permit conditions, such as preservation plats, proof of recordation of protective instruments, proof of credit purchase, or compensation monitoring reports.

If the permittee did not submit compensation monitoring reports or water withdrawal reports as required, then the monitoring period must start over, which may necessitate a permit extension. For example, if a permittee did not provide annual reports for five years as required, then they would be required to conduct five years of monitoring and reporting as required by the permit. However, in the case of compensation monitoring reports, if the responsible party can demonstrate that the compensation site has met or exceeded the required success criteria, continued monitoring may not be necessary.

C. Expired Permits

Staff should evaluate permit compliance prior to expiration in order to provide more options for addressing alleged violations. Staff should evaluate expired permits for compliance with specific permit conditions and assign Points in the same manner as for an active permit. Administrative violations within 12 months of permit expiration remain referable violations. For expired permits, Staff should consider issuance of a NOV only in consultation with the Division of Enforcement.

For expired permits, Staff must confirm, at a minimum, that:

- Permitted impacts were taken in accordance with the original permit;
- If additional impacts were taken, Points are assessed in accordance with the “Exceeding Permitted Impacts” infraction (Point Assessment Criteria – Table 1); and
- Compensation was completed in accordance with State Water Control Law and original permit conditions regarding the location and mitigation ratios.

If these conditions are not met, a NOV may be warranted.

VII. DOCUMENTING AND TRACKING NONCOMPLIANCE

At a minimum, documentation of alleged noncompliance found during a site inspection (onsite violations) must include:

- Field notes and/or inspection forms;
- Delineation data sheets (as necessary for unpermitted impacts);
- Photographs with supporting descriptive information;
- Inspection report summarizing the findings;
- Maps or drawings showing the location and extent of alleged noncompliance;
- Points Assessment Criteria calculation worksheets; and
- Any required CEDS data entry.

Tracking Administrative Requirements

Staff should have a mechanism in place for periodic compliance audits. For example, Staff can generate monthly or quarterly audit reports of scheduled and delinquent compliance events (monitoring reports, notifications, etc.) to identify those responsible parties that are not in compliance with administrative permit conditions. Database audits, carried out through CEDS, Discoverer, or Access queries, can identify delinquent submittals and track noncompliance. Regional Staff should prioritize Staff time and operate within workload constraints to conduct inspections of construction and compensations sites. Staff can use delinquency reports in conjunction with onsite inspections and comprehensive compliance review information to assess overall noncompliance.

Appendix A. Point Assessment Criteria.

Table 1. Non-Administrative (Onsite) Violations

Infraction	Points			Notes
	1 st Occurrence	2 nd Occurrence	Additional Occurrence	
<p><u>Unpermitted</u> Failure to obtain coverage under a VWPP General or Individual Permit prior to commencing activity:</p> <p style="padding-left: 40px;">Major Unpermitted Impacts</p> <p style="padding-left: 40px;">Minor Unpermitted Impacts</p>	4	4	4	<p>For unpermitted activity, assess Points for this infraction only. Do not use any of the other onsite infractions listed.</p> <p>Impact areas in multiple locations over a given time period are summed to determine if the impact is considered major or minor. Individual impacts are generally not assigned Points separately. Inspection reports should still indicate if more than one State water is impacted and over how many days the discharge has occurred.</p> <p>Major Unpermitted Impact: Generally, impacts that exceed 0.10 acre of wetland or open water, or 300 linear feet of streambed, and water withdrawals greater than or equal to 90 million gallons per month are considered major and should require a NOV. However, these acreage and linear feet impact thresholds serve only as a guide for assessing alleged noncompliance. The facts of the case must be considered carefully regardless of the size of impacts. Smaller impacts to more significant aquatic resource functions may also be considered major.</p> <p>Minor Unpermitted Impacts: Generally, impacts to less than 0.10 acre of wetland or open water, or 300 linear feet of streambed, and water withdrawals less than 90 million gallons per month can be considered minor based on the particular facts of the case.</p>

Table 1. Non-Administrative (Onsite) Violations

Infraction	Points			Notes
	1 st Occurrence	2 nd Occurrence	Additional Occurrence	
<u>Exceeding Permitted Impacts</u>				
Major Exceedance	1-4	1-4	4	Minor Exceedance: below minor modification/notice of planned change thresholds
Minor Exceedance	1-2	1-2	4	Major Exceedance: above minor modification/notice of planned change thresholds
				Impact areas in multiple locations over a given time period are summed to determine if the impact is considered major or minor; individual impacts are not assigned Points separately
				Impact thresholds serve only as a guide for assessing alleged noncompliance; the facts of the case must be considered carefully regardless of the size of impacts; smaller impacts to more significant aquatic resource functions may also be considered major, whereas larger impacts in context with a larger permitted impacts may be considered minor

Table 1. Non-Administrative (Onsite) Violations

Infraction	Points			Notes
	1 st Occurrence	2 nd Occurrence	Additional Occurrence	
<p><u>Compensatory Mitigation</u> Failure to conduct compensatory mitigation in accordance with approved mitigation plan as follows:</p> <p>Onsite or off-site creation, restoration, or enhancement not initiated</p> <p>Failure to purchase bank credits, contribute to in-lieu fee fund, record preservation deed restrictions, etc.</p> <p>Late purchase of bank credits, contribution to in-lieu fee fund, recordation of preservation deed restrictions, etc.</p> <p>Compensation work not performed in accordance with approved plan or not completed</p>	<p>4</p> <p>4</p> <p>2</p> <p>1-4</p>	<p>4</p> <p>4</p> <p>2</p> <p>1-4</p>	<p>4</p> <p>4</p> <p>2</p> <p>1-4</p>	<p>If compensation work was not performed in accordance with the approved plan or was not completed, the Points allocated for this infraction should be assigned after considering the degree of variance from the approved compensation plan, extent of fulfillment of “no net loss” requirements, and the level of cooperation demonstrated by the permittee in regards to corrective action; for example, a compensation site at the end of its monitoring period is found to be a PEM wetland instead of a PFO wetland, as designed, <u>and</u> the permittee refuses to complete the required corrective action – this infraction should be assigned a higher Point value (4.0 Points) than an infraction in which the required number of groundwater monitoring wells have not been installed at a compensation site (1.0 to 2.0 Points)</p>
<p><u>Construction Special Conditions</u> Failure to comply with required construction special conditions (such as stormwater management, E&S controls, flagging non-impact areas, restoring temporary impacts, working in the dry, time of year restrictions, minimum stream flow, sidecasting in streams, operating equipment in streams, discharge of concrete to waters, etc.):</p> <p>With Major Impact to Surface Waters</p> <p>With Minor Impacts</p> <p>With No Impact</p>	<p>2</p> <p>1</p> <p>0.5</p>	<p>4</p> <p>1</p> <p>0.5</p>	<p>4</p> <p>2</p> <p>1</p>	<p>If the activity results in a measurable impact, then the activity should also be accounted for in the first section of this table</p>

Table 1. Non-Administrative (Onsite) Violations

Infraction	Points			Notes
	1 st Occurrence	2 nd Occurrence	Additional Occurrence	
<u>Water Withdrawals</u>				If the activity results in a measurable impact, then the activity should also be accounted for in the first section of this table
Intake modification without notification/permit	2	4	4	
Build or replace dam without notification/permit for construction and/or increased withdrawal	2	4	4	
“Grandfathered” users increase withdrawal without first obtaining a permit	2	4	4	
<u>Corrective Action</u>				Where permittee has been notified of alleged noncompliance and Staff has requested corrective actions in writing that have not been implemented by the permittee
Failure to undertake required corrective action	2	2	2	
Failure to undertake required corrective action resulting in failure to meet success criteria	4	4	4	
Failure to conduct required water quality monitoring	2	4	4	
Any activity resulting in a fish kill; failing to report a fish kill, fuel, or oil spill	4	4	4	

Table 2. Administrative Violations

Infraction	Points			Notes
	1 st Occurrence	2 nd Occurrence	Additional Occurrence	
<u>Construction Monitoring</u>				
Failure to submit construction monitoring report within the required timeframe	0.5	1	1.5	Permittee must be notified of the initial late submittal and Points assessed; if the required submittal is not received within the period requested, then the violation would be assessed additional Points using the Point level for the next occurrence; this repeats until the case is referred to the Division of Enforcement Each report required is assigned Points and tracked separately; for example, if 3 monthly CMR's were required, failure to submit each would be considered a violation and would receive 0.5 Points for a total of 1.5 Points; however, the Point values are not elevated to the 2 nd or additional occurrence unless the permittee has been notified and does not respond
Report does not include required information and/or contains omissions or errors so great as to prevent a determination of compliance	0.5	0.5	1	
<u>Compensation Monitoring</u>				
Failure to submit compensation monitoring report within the required timeframe	1	2	2	Deed restriction has been recorded, but notice was not provided to DEQ Credit purchased or trust fund payment was made, but notice was not provided to DEQ
Report does not include required information and/or contains omissions or errors so great as to prevent a determination of compliance	0.5	0.5	1	
Failure to provide copies of conservation easements or preservation plats within the required timeframe	0.5	1	1	
Failure to provide proof of credit purchase or trust fund payment within the required timeframe	0.5	1	1	
Failure to submit a complete final mitigation plan within the required timeframe	1	2	2	

Table 2. Administrative Violations

Infraction	Points			Notes
	1 st Occurrence	2 nd Occurrence	Additional Occurrence	
<u>Water Withdrawal Monitoring</u>				
Failure to submit water withdrawal monitoring report within the required timeframe	0.5	1	1.5	Permittee must be notified of the initial late submittal and Points assessed; if the required submittal is not received within the period requested, then the violation would be assessed additional Points using the Point level for the next occurrence; this repeats until the case is referred to the Division of Enforcement
Report does not include required information and/or contains omissions or errors so great as to prevent a determination of compliance	0.5	0.5	1	Each report required is assigned Points and tracked separately
<u>Notification</u>				
Failure to provide required notice prior to commencing or completing construction or compensation	1	1	1	Where several distinct impacts occur at different times, separate notification may be necessary and each would be assessed additional Points
Failure to submit plans and specifications for permitted areas prior to initiating construction	0.5	0.5	1	
<u>Other Violations Not Listed Above</u>				
Failure to record conservation easements not required as compensation, include certification statements, submit as-built surveys, provide permit transfer notification, etc.				Major Harm: Alleged violation related to a documented substantial adverse environmental impact, or presents substantial risk, or has a substantial adverse affect on the regulatory program
Failure to submit required information so as to prevent a determination of compliance or violation resulting in Major Harm	1-3	1-3	4	Minor Harm: Alleged violation presents little or no risk of environmental impact, or has little or no adverse effect on the regulatory program
Information is not required in order to determine compliance or, violation resulting in Minor Harm or no environmental harm	0.5	0.5	1	

Table 3. Aggravating Factors

Notwithstanding the above, any infraction with the following characteristics may be considered an aggravating factor. This should be determined on a case-by-case basis and in consultation with the Division of Enforcement.

Infraction	Points			Notes
	1 st Occurrence	2 nd Occurrence	Additional Occurrence	
Staff can also assign Points for additional factors associated with unpermitted impacts or permit exceedances. Factors include but are not limited to: Adverse environmental impact, loss of beneficial use, or presenting an imminent and substantial danger to human health or the environment	4	4	4	Adverse environmental impact, loss of beneficial use, or imminent danger must be documented Typical factors include impacts to threatened, endangered, or rare species and habitats, compliance history, impacting wetlands avoided through permit negotiations, wetland type and/or quality, landscape or regional considerations (amount of impact in comparison to watershed), landowner notification of permit requirement, substantial economic benefit, and additional impacts required to complete the project; other factors may also be considered (<i>see</i> Section VI.A)
Potential for adverse impact or loss of beneficial use	2	2	2	Potential for secondary effects to cause adverse impact(s) to beneficial uses; impact is expected but has not occurred yet; for example, presence of or potential impacts to threatened, endangered, or rare species and habitats
Violations resulting in exceedance of water quality standards	2	2	2	For example, use of improper E&S controls within stream channels may result in impounding water or impeding flow, effecting temperature, pH, and/or dissolved oxygen levels
Suspected falsification	4	4	4	
Suspected willful violation	4	4	4	
<u>Site Access Violations</u> Failure to provide reasonable access otherwise required by statute or permit to any facilities where there is adverse environmental impact or an imminent and substantial danger	4	4	4	
Other site access violations	1	3	3	

Appendix B. Point Calculation Worksheet.

Project Name: _____

Permit/PReP Number: _____

Point Assessment Date: _____

	Comprehensive List of Infractions			
	Infraction	Points	Date of Noncompliance	Date Noncompliance Corrected
	<i>List all infractions</i>	<i>List Points for each infraction</i>	<i>List the date of noncompliance for each infraction</i>	<i>List the date the noncompliance was corrected</i>
Onsite				
Administrative				
Aggravating Factors				

Table used to summarize infractions found over the life of a project; List includes new violations, along with old violations previously addressed

Noncompliance Determination

_____ **Onsite Points**

_____ **Administrative Points <12 months old**

_____ **Aggravating Factor Points**

_____ **Total**

VWPP Program Staff Signature

Date